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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

In re CIRCUIT CITY STORES, INC., *et al.*, Debtors.	Case No.: 08-35653-KRH (Jointly Administered) Chapter 11

OPPOSITION OF PARAMOUNT HOME ENTERTAINMENT INC. TO DEBTORS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CERTAIN CLAIMS SUBJECT TO THE DEBTORS' NINETEENTH AND THIRTY-THIRD OMNIBUS OBJECTIONS TO CLAIMS[1]

[1] By agreement with the Debtors, Paramount's response date was extended to January 11, 2010.

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I.
OVERVIEW OF OPPOSITION

The Debtors have filed a motion to resolve, as a matter of law, the rights of Paramount Home Entertainment Inc. ("Paramount") and other vendors entitled to reclamation under 11 U.S.C. ("Bankruptcy Code") § 546(c). They have done so via a motion for summary judgment[2] that, by necessity, can be granted only if there presently are, Fed. R. Civ. P. 56(c), and after diligently pursued discovery, can be, Fed. R. Civ. P. 56(f), no disputed issues of material fact.

To meet this standard, the Debtors rely upon three main arguments:

1. Under section 546(c), as revised by BAPCPA, there is no such thing as a reclamation claim. Paramount's only right was limited to physical reclamation of its goods, and as those goods have all been sold, it has no further right, save and except to assert a general unsecured claim. Debtors' Brief, at 18-25; *see also id.* at 34-35 (arguing that any reclamation right does not extend to proceeds).

2. To the extent Paramount had a claim, it lost it by failing to pursue it diligently, notwithstanding Paramount's full compliance with this Court's first day order establishing reclamation procedures.[3] Debtors' Brief, at 25-29.

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[2] *Debtors' Motion for Summary Judgment with Respect to Certain Claims Subject to (I) The Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) and (II) the Debtors' Thirty-Third Omnibus Objection to Claims (Modification and/or Reclassification of Certain Claims)* [Docket No. 6135] (the "Motion"), which is supported by a memorandum of law [Docket No. 6136] (the "Debtors' Brief").

[3] *Order Under Bankruptcy Code Sections 105(a), 362, 503(b), 507(a), 546(c), and 546(h) (I) Granting Administrative Expense Status to Obligations from Postpetition Delivery of Goods; (II) Authorizing Payment of Expenses in the Ordinary Course of Business; (III) Authorizing Debtors to Return Goods; and (IV) Establishing Procedures for Reclamation Demands*, entered November 13, 2008 [Docket No. 133], as made final on December 5, 2008 [Docket No. 897] (the "Reclamation Procedures Order").

3. There can be no administrative claim in these cases because the prepetition lenders held a floating lien on the Debtors' inventory and the debt owed on the petition date to the lenders exceeded the value of Paramount's inventory on that date. Debtors' Brief, at 29-34 (the so-called "prior lien defense").

Paramount answers all three of these contentions as follows:

1. On whether Paramount is entitled to a claim, we answer that BAPCPA did not do away with the right to an administrative claim; indeed, the Reclamation Procedures Order (quoted below) so recognized that. Further, even assuming that reclamation operates solely *in rem*, if any Paramount goods remained in the Debtors' possession at the time the prior secured lienholders were paid,[4] all proceeds generated thereafter belong to Paramount. In this latter connection, outstanding discovery seeking to ascertain what the Debtors owed and what Paramount goods they held on a daily basis post-petition is highly germane and has not been answered.[5]

2. The argument that Paramount did not act swiftly or decisively enough in suing to physically reclaim its goods or to enjoin their sale relies on the ultimate "gotcha." Nothing in Bankruptcy Code section 546(c) suggests that steps beyond the making of the demand are necessary and significant case law supports

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[4] As discussed more fully below, *see* note 19 *infra*, Paramount disagrees with the Debtors' contention that the payoff of the prepetition lenders by the DIP lenders is not consequential for purposes of 546(c) and that the relevant question is the existence and amount of the DIP loan. However, even if the Debtors are correct, at some point, possibly prior to the sale of some or even any of Paramount's goods (as full discovery will eventually reveal), the DIP loan was paid, rendering the reclamation demand then assertable unless the prior lien defense destroyed Paramount's reclamation right on day one.

[5] *See Declaration of David M. Stern Pursuant to Fed. R. Civ. P. 56(f)* ("Stern Decl."), ¶ 11 and Exhibits 1 & 2, filed concurrently.

this interpretation. No one could, or does, dispute that this Court issued its Reclamation Procedures Order on the third day after these cases were filed, and that Paramount fully complied with that order. Under those procedures, Paramount's Reclamation Demand was conveniently not deemed rejected by the Debtors until two days after they completed their going-out-of business sales and had sold all of their inventory. Because Paramount complied with the Court's procedures, by the time the reclamation demand was rejected, the goods were sold and it was too late for Paramount to take the steps the Debtors suggest were required. Now, more than a year after the Reclamation Demand was made, the Debtors contend that was not enough and that Paramount's failure to do more than the Reclamation Procedures Order required disentitles Paramount to any relief. This simply cannot be the case.

3. Finally, the prior lien defense seeks to distort the language of section 546(c) to extinguish the right of reclamation whenever a prior secured lender is owed more than the value of any individual vendor's inventory held by the debtor on the petition date. Notably, if this is the test, a debtor with inventory on the petition date of $1 billion equally divided among 1,000 vendors (*i.e.*, $1 million each) which owes its bank $1.5 million on the petition date, secured by the $1 billion in inventory, can defeat the reclamation rights of all 1,000 vendors. That result is neither sensible nor supported by law.

We discuss the key events in these cases and amplify on each of these points below.

II.
BACKGROUND: KEY EVENTS AND PLEADINGS

On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code.

Also on the Petition Date, the Debtors sought – and were granted two days later – authority to enter into a post-petition, debtor-in-possession, secured financing facility (the "DIP Facility").

On November 12, 2008, the Debtors used proceeds of the DIP Facility to repay all outstanding obligations under their prepetition credit facility, which was secured by, among other things, all of their inventory. *See* Debtors' Brief, at 7. The DIP Facility was, in turn, also secured by, among other things, the Debtors' inventory and the proceeds thereof. *Id.*

On the following day, November 13, 2008, the Court entered the Reclamation Procedures Order, which was finalized on December 5, 2008. In pertinent part, it provided:

1. Precise instructions for filing a reclamation demand, including where to file and what to include. Reclamation Procedures Order, ¶¶ 5(a) & (b), at 4-5.

2. A 120-day period for the Debtors to examine the Reclamation Demands and to "advise each Reclamation Claimant of the ***allowed amount***, if any, ***of the Reclamation Demand*** (the 'Allowed Reclamation Amount'). Absent receipt of any notice setting forth such an Allowed Reclamation Amount, the Debtors shall be deemed to have rejected the Reclamation Demand." *Id.*, ¶ 5(c), at 5 (emphasis added).

3. Authorization for the Debtors to pay the Allowed Reclamation Amount or to return the goods. *Id.*, ¶ 5(d), at 5-6.

Consistent with the Reclamation Procedures Order, indeed a day prior to its entry, Paramount served its *Demand for Reclamation of Goods by Paramount Home Entertainment* (the "Reclamation Demand"). In the Reclamation Demand, Paramount demanded the return of the products delivered to and accepted by the Debtors while insolvent in the ordinary course of business within the 45-day period preceding the Petition Date, which products had a total value of $11,600,840.04.[6]

On January 30, 2009, Paramount timely filed Claim No. 9681, asserting a claim in the amount of $16,497,463.67 (the "General Claim"). Because the Reclamation Demand had not been responded to by the Debtors – the 120 days had not yet run – and an earlier claim seeking administrative priority pursuant to 11 U.S.C. § 503(b)(9) had neither been objected to nor paid,[7] Paramount sought administrative priority in the amount of $14,801,853.41 in the General Claim, being the sum of the previously asserted Reclamation Demand and the 503(b)(9) Claim.

From January 17, 2009 through March 8, 2009, the Debtors held Court-approved going-out-of-business ("GOB") sales. *See, e.g., Debtors' Twentieth Omnibus Objection*

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[6] The Reclamation Demand was attached to the *Response of Paramount Home Entertainment Inc. to Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims)* [Docket No. 4155] ("Paramount's Initial Response") and can again be provided upon request. Similarly, the 503(b)(9) Claim and the General Claim (both as defined below) are not included herein, but were provided in Paramount's Initial Response and will be provided again upon request. Paramount's Initial Response, at 6-7, also sets forth certain background facts and basic law which are also not repeated here, but incorporated by this reference.

[7] On December 19, 2008, Paramount timely filed its claim arising under section 503(b)(9) of the Bankruptcy Code, Claim No. 1009, asserting a priority claim in the amount of $3,201,013.37 (the "503(b)(9) Claim"). Paramount since has agreed with the Debtors that the correct amount of the 503(b)(9) Claim is $3,133,634.57.

to Claims (Reclassification to Unsecured Claims of Certain Claims Filed as 503(b)(9) Claims for Goods Received by the Debtors Not Within Twenty Days of the Commencement of the Cases) [Docket No. 3704], ¶ 9. In the *Disclosure Statement with Respect to First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and Its Affiliated Debtors and Debtors in Possession and Its Official Committee of Creditors Holding General Unsecured Claims* [Docket No. 5030] (the "Disclosure Statement"), the Debtors represented that by the end of the GOB sales, the DIP Facility had been paid in full. Disclosure Statement, at 16. As the Debtors' first proposed chapter 11 plan also provides for payment of some unsecured creditors, *see* Docket No. 5124, it is clear that after the satisfaction of the Debtors' secured lenders, there are proceeds remaining for distribution.[8]

Because Paramount was never sent a notice setting forth an allowed amount of its reclamation claim, pursuant to the Reclamation Procedures Order, Paramount's Reclamation Demand was deemed rejected on March 10, 2009, *i.e.*, two days after the Debtors concluded their GOB sales.

On June 22, 2009, the Debtors filed the *Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims)* [Docket No. 3703] (the "Objection"). In the Objection, the Debtors sought reclassification of certain claims asserting priority to general unsecured, non-priority claims, giving as their only explanation for the proposed reclassification that, according to their books and records, the claims are "asserted with incorrect

[8] More precise information is sought in Paramount's outstanding discovery. Stern Decl., ¶ 9 & Exhibits 1 & 2.

classifications." *See* Objection, ¶ 11. Among the claims the Debtors sought to reclassify in the Objection was Paramount's General Claim. Specifically, the Debtors sought to reclassify the amount to which Paramount asserted the right to priority in the General Claim (*i.e.*, $14,801,853.41) as a general unsecured, non-priority claim.

On July 16, 2009, Paramount filed Paramount's Initial Response, in which it opposed the Objection to the extent that it seeks to reclassify the administrative priority claim, resulting from its valid reclamation right, in the amount of $11,600,840.04, to a general unsecured claim. Also in that response, Paramount clarified a miscalculation of the portion of its General Claim entitled to priority. For purposes of clarity, Paramount asserts that its total claim of $16,497,463.67 should be classified as follows:

1. A section 503(b)(9) claim, Claim No. 1009, in the amount of $3,133,634.57.
2. A reclamation claim, which may be denominated as an *in rem* demand for the proceeds of the goods subject to reclamation up to $11,600,840.04. This amount is inclusive of the amount entitled to priority pursuant to section 503(b)(9), although obviously Paramount does not seek a double recovery.
3. A general prepetition claim, Claim No. 9681, for $16,497,463.67 less amounts which are allowed in connection with the reclamation claim and the section 503(b)(9) claim.[9]

[9] Because the General Claim, Claim No. 9681 is inclusive of the 503(b)(9) Claim, which has not been disallowed by the Court, the proposed order accompanying the Debtors' Motion cannot be entered as drafted even if the Court grants the Debtors' Motion in full. In particular, the proposed order states that the entirety of Claim No. 9681 should be reclassified as a general unsecured, non-priority claim. Regardless of the Court's decision on the Motion, this result is not warranted as Paramount is entitled to payment of the 503(b)(9) Claim as an administrative expense.

To ascertain preliminary information relevant to its reclamation rights, Paramount propounded formal discovery on the Debtors by serving *Paramount Home Entertainment Inc.'s First Set of Interrogatories to Circuit City Stores, Inc., et al.*, and *Paramount Home Entertainment Inc.'s First Set of Requests for Production of Documents to Circuit City Stores, Inc., et al.* on November 23, 2009. *Stern Decl.*, ¶ 6; Exhibits 1 & 2. The Debtors and Paramount informally agreed that the Debtors had through December 31, 2009 to respond to interrogatory numbers 7, 8 and 9, as the responses to those interrogatories would be particularly crucial to Paramount's arguments regarding its right of reclamation, and that responses to all other discovery could be postponed until after the January 14, 2010 hearing. *Stern Decl.*, ¶ 9.

On December 28, 2009, the Debtors sent the *Debtors' Objections and Responses to Paramount Home Entertainment Inc.'s First Set of Interrogatories to Circuit City Stores, et al.* (the "Discovery Response). *Stern Decl.*, ¶ 10 & Exhibit 3. From the Discovery Response, Paramount has learned that according to the Debtors' records, they held $14,571,763.62 of Paramount's goods in their inventory at the end of business on November 9, 2008 and that the Debtors' no longer have any of Paramount's goods in their possession. Paramount did not receive any information in response to interrogatory number 8, which asked the Debtors to state the amount of proceeds they received from the sale of Paramount goods from the Petition Date through the present time in the form of a daily tally or broken down by the shortest periods possible. The Debtors objected to the interrogatory but also stated that this data is not available because their recordkeeping

systems did not track sales in this manner. *Stern Decl.*, ¶ 10 & Exhibit 3.[10] Among the other key information which the Debtors have not yet supplied is a daily accounting of the amount of debt secured by the inventory. *Stern Decl.*, ¶ 11 & Exhibit 1 (Interrogatories 11 & 13).

It is against this backdrop that the Motion must be judged.

III.
STANDARD FOR SUMMARY JUDGMENT

Paramount agrees with the Debtors that "[s]ummary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Debtors' Brief, at 17.

That view is tempered if "the nonmoving party has not had the opportunity to discover information that is essential to his opposition." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In such a case, a respondent should not be "'railroaded' by a premature motion for summary judgment." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). As another district court in this Circuit recently held:

> Rule 56(f) provides this Court with the discretionary authority, in appropriate cases, to deny a premature motion for summary judgment where the nonmoving party demonstrates that he has not had adequate time for discovery or needs additional time to complete it.

Minter v. Wells Fargo Bank, 593 F. Supp. 2d 788, 792 (D. Md. 2009).

In these cases, Paramount promptly propounded discovery but the Debtors have not yet fully answered it. Paramount's counsel has supplied an affidavit describing what

[10] That the Debtors' recordkeeping systems may not readily produce this data does not mean it cannot be produced. There may be a fight as to whose burden it is to produce this information, but given the stakes, the information clearly can be generated. *Stern Decl.*, ¶ 10.

discovery is needed and why. As noted therein, and by way of example, that discovery may reveal that the Debtors still held some or even all of the goods subject to Paramount's Reclamation Demand at the time they had raised funds sufficient to satisfy the claim secured by the floating lien on inventory. That would certainly be true if the only relevant lien is that of the prepetition lenders. Even if the lien held by the DIP lenders is the pertinent one, it is likely, and certainly an open question at this time, as to when the GOB sales generated adequate proceeds to pay that loan in full and how much Paramount inventory was in the Debtors' possession when that point was reached. As such, unless this Court agrees with the extreme positions taken by the Debtors (about which more below), the Motion should be denied at this time.

IV.
BAPCPA DOES NOT PROHIBIT THE COURT FROM PROVIDING A DENIED RECLAMATION CLAIMANT WITH PAYMENT AHEAD OF GENERAL UNSECURED, NON-PRIORITY CLAIMANTS

The Debtors argue that, as amended in 2005, Bankruptcy Code section 546(c) merely provides a seller of goods with the right to reclaim. It bases this argument on the deletion of prior section 546(c)(2), which required the court to grant a seller it had denied the right of reclamation either an administrative expense claim or a lien. From this change, the Debtors deduce that a reclaiming seller has no right to any remedy other than retaking its goods. *See* Debtors' Brief, at 19-21. Therefore, the Debtors argue that cases granting reclaiming creditors relief other than return of goods, but which were decided under pre-2005 law, cannot be relied upon and, further, that even if those cases were still good law, in these cases, they are inapplicable because the Court never denied the reclamation demands; rather, the Debtors merely rejected them. *Id.* at 20-25.

None of these arguments is persuasive. First, it is anything but clear what the congressional intent behind the deletion of the prior section 546(c)(2) was. It is true that the section was physically replaced by a section referring to the right to an administrative expense priority claim under section 503(b)(9), but it does not logically follow, as the Debtors' argue, that "Congress clearly intended to eliminate any right to an administrative expense (other than under section 503(b)(9)) or a junior lien under section 546(c)." *Id.* at 22. In addition to providing the alternative remedies of administrative expense priority or a junior lien, the deleted section 546(c)(2) also contained the only language in the section describing the court's discretion to deny the right of reclamation. By the Debtors' logic, the deletion of that section must be interpreted to make the right of reclamation an absolute right — a right that the court no longer has the ability to deny. On the other hand, the deletion could also mean that the court now has broader authority to deny reclamation and is not limited to doing so only where it provides one of the alternatives that was previously included in the statute.[11] As neither of these possible interpretations forecloses providing a reclaiming creditor such as Paramount with a remedy, the statute is, at best, unclear as to what treatment should result if a debtor decides to keep and use the goods subject to reclamation.[12]

Further, the revision to the statute, including the deletion of prior section 546(c)(2) should be read in the context of the many other BAPCPA amendments, which largely

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[11] As noted earlier, at page 4, the Reclamation Procedures Order appeared to endorse this view in paragraph 5(c) which provided that the Debtors would "advise each Reclamation Claimant of the ***allowed amount***, if any, ***of the Reclamation Demand***…." (emphasis added).

[12] The UCC commentary and at least one court would likely label that conduct not retention and use, but fraud and conversion. *See* Paramount's Initial Response, at 8-9 & n.11.

evidence an intent to broaden the rights of trade creditors. A. Resnick, *The Future Of Chapter 11: A Symposium Cosponsored by the American College of Bankruptcy: The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases*, 47 B.C. L. Rev 183, 208 (2005) ("The 2005 amendments have expanded a seller's right to reclaim goods.").[13] As noted in Paramount's Initial Response, it would be illogical to conclude that the same Congress that enhanced the protections afforded to reclamation claimants,[14] would render those protections meaningless and unenforceable through the same set of amendments. Especially in this context, where the Debtors decided to keep and sell the goods, despite the valid reclamation demand, and where, given the procedural posture of the case, it must be assumed that, at the time the prepetition loans were paid and at the time the DIP Facility was satisfied (whichever is the relevant reference point), all of the goods subject to the Paramount Reclamation Demand were still in the Debtors' possession and then subsequently sold, it seems particularly in line with the history and purpose of section 546 that Congress would have intended for Paramount and other similarly-situated creditors to continue to have some remedy available to them.

Given this background and context, a straight-forward reading of the statute as a whole produces a much more sensible result. Although the Debtors focus on the deletion of prior section 546(c)(2) and on the addition of the "subject to" language (discussed in greater detail in section VI), language that was part of the statute prior to 2005 and

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[13] Professor Resnick is one of many commentators who observed (often with consternation), at the time of enactment, that BAPCPA had enormously expanded the rights of trade creditors. His observations are notable as he is, and has been, for some time the principal editor of Collier on Bankruptcy.

[14] For example, BAPCA extended the look-back period before bankruptcy during which goods may be subject to reclamation from 10 to 45 days and lengthened the period to request reclamation from 10 to 20 days post-petition, for requesting reclamation.

remained after the 2005 amendments is much more significant. The statute has long stated that the "rights and powers of the trustee under section[] 544(a) . . are subject to" the right of a reclaiming seller. *See* 11 U.S.C. § 546(c)(1). Therefore, while Paramount acknowledges that the statute no longer sets forth a specific right to either an administrative expense priority claim or junior lien, the statute does set up a very logical priority scheme in which the trustee's rights are no better vis-à-vis a reclaiming vendor than those of the prepetition debtor. *Accord* Pester Refining Co. v. Ethyl Corp. (In re Pester Refining Co.), 964 F.2d 842, 845 (8th Cir. 1992) (finding that, although subject to a senior secured lienholder, reclamation creditors have priority over general unsecured creditors); In re Hartz Foods, Inc., 264 B.R. 33, 37 (Bankr. D. Minn. 2001) (same); *see, also*, In re Sunstate Dairy & Food Prods. Co., 145 B.R. 341, 346 (Bankr. M.D. Fla. 1992) (granting an administrative priority claim because a reclaiming seller whose goods are kept and sold or used by the estate has benefitted the estate).

Not only would it destroy this statutorily-specified scheme to relegate valid reclamation claimants to the status of general unsecured, non-priority claimants where there are sufficient funds to pay the reclamation claims after the senior secured lienholder has been satisfied, it would also violate the oft-stated principle that "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" Dewsnup v. Timm, 502 U.S. 410, 419 (1992). Thus, changes in prior practice are not presumed based on vague language absent "at least some discussion in the legislative history." *Id. See also* Keene Corp. v. United States, 508 U.S. 200, 209 (1993) ("Although Keene urges us to see significance in the deletion of the 'file or prosecute' language in favor of the current

reference to 'jurisdiction' in the comprehensive revision of the Judicial Code completed in 1948, we do not presume that the revision worked a change in the underlying substantive law 'unless an intent to make such [a] change is clearly expressed.'").

The Debtors argue that because the statute has been revised in part, the prior case law, including the above-cited *Pester Refining* case, as well as Phar-Mor v. McKesson Corp. (In re Phar-Mor, Inc.), 534 F.3d 502 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2053 (Apr. 27, 2009), and In re Georgetown Steel Co., 318 B.R. 340 (Bankr. D. S.C. 2004), can no longer be relied upon. *See* Debtors' Brief, at 20-22. *Phar-Mor* and *Georgetown Steel* are particularly pertinent because both cases interpreted the prior statute and found that reclaiming creditors were entitled to administrative expense priority, but their holdings did not rest solely on prior section 546(c)(2). Therefore, Paramount submits that much of those courts' discussions of reclamation, as well as the Eighth Circuit's holding in *Pester Refining*, are applicable to aid in the interpretation and implementation of the current statute.[15] Indeed, not referencing prior law – absent clear direction from Congress to disregard it – would be contrary to the Supreme Court's rule of construction set out in *Dewsnup*.

Given the harm that these cases do to the Debtors' position, they make a final desperate attempt to argue that these cases do not apply and that the Court can no longer provide alternative remedies by distinguishing their own "rejection" of the demands on March 10, 2009 from a "denial" by the Court. *See* Debtors' Brief, at 24. But this

[15] The Debtors, of course, also rely throughout their brief on pre-2005 cases. Paramount believes that it is perfectly reasonable to rely on these cases, except where a particular holding is based on a changed section of the statute.

distinction cannot affect Paramount's right of reclamation. As an initial matter, the current statute does not reference the ability of the court to "deny" reclamation. The Debtors' focus on a distinction between the language in the Reclamation Procedures Order regarding "rejection" and statutory language regarding "denial" that no longer even exists should raise a red flag. In addition, given that the Court granted the Debtors' requested procedures in the Reclamation Procedures Order, the Debtors' "rejection" of the Reclamation Demand, was Court-authorized, minimizing the alleged distinction. If the Debtors knowingly set up these procedures under which they could "reject" a demand (notably post-conclusion of the GOB sales) with the intent to later argue that this did not constitute the Court's denial of reclamation, then it appears they have used this Court to mislead the numerous reclamation claimants in these cases. If, as is more likely, the Debtors' recognized the difference between the language in the Reclamation Procedures Order and prior statute after the fact, then it is disingenuous for them to argue that this distinction, which they did not intend, is a clear one that can be enforced against the reclamation claimants.

In short, it is more consistent with the history of the remedy of reclamation, the intent behind the BAPCPA amendments to the Bankruptcy Code, and a straight-forward reading of the statute – which expressly makes the estate's rights subject to a reclaiming vendors' rights, and a reclaiming vendor's rights subject to a consensual lender's rights – to provide Paramount with priority over general unsecured, non-priority creditors once the prepetition lenders (and, arguably, the DIP lenders) have been paid. Whether the mechanism for doing so is an *in rem* remedy against the excess funds from the GOB sales or an administrative claim is of no moment.

V.
PARAMOUNT WAS NOT REQUIRED TO TAKE ANY STEPS BEYOND MAKING ITS RECLAMATION DEMAND TO PROTECT ITS RIGHT

The Debtors next claim that regardless of what rights or remedies may have been available to Paramount and the other reclamation claimants under the statute, they have now been lost because the claimants failed to pursue their reclamation demands diligently. *See* Debtors' Brief, at 26 (citing In re First Magnus Fin. Corp., 2008 WL 5046596, at *2 (Bankr. D. Ariz. Oct. 16, 2008); In re McLouth Steel Prods. Corp., 213 B.R. 978, 987 (Bankr. E.D. Mich. 1997); Tate Cheese Co. v. Crofton & Sons, Inc. (In re Crofton & Sons, Inc.), 139 B.R. 567, 569 (Bankr. M.D. Fla. 1992)). While Paramount acknowledges that the above-cited authority supports the proposition that there are additional steps, in certain circumstances, that reclaiming creditors must take to preserve their rights, it submits that the Debtors' characterization of the law on this point is incomplete and that the cases cited, even if decided correctly, would not be applicable here.

First, a plain reading of the statute suggests that a reclaiming creditor will establish its right to reclaim by making a demand as described in the statutory text. The only statutory requirement for one who meets the definition of a seller who may reclaim is that such seller "demands in writing reclamation of such goods— (A) not later than 45 days after the date of receipt of such goods by the debtor; or (B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case." *See* 11 U.S.C. § 546(c)(1). There is simply no mention of a requirement to take steps beyond the making of a demand.

In addition, the Debtors ignore case law contrary to their position, including the only Circuit Court of Appeals to consider the issue. In In re Griffin Retreading Co., 795 F.2d. 676, 679-80 (8th Cir. 1986), the Eighth Circuit Court of Appeals held that "[t]o require the reclaiming creditor to follow its demand with an adversarial proceeding would only foster a race to the courthouse." *See also Hartz Foods*, 264 B.R. at 36 (same); In re Flagstaff Foodservice Corp., 32 B.R. 820, 823 (Bankr. S.D.N.Y. 1983) ("The filing of an adversary proceeding is not mandatory" and "it would neither be economical nor expeditious to require all of the numerous reclamation creditors to commence adversary proceedings"). Further, in *Griffin Retreading*, the Court found that it was the debtor's burden to resolve the issue of reclamation if it desired to use the goods subject to a demand by making a specific request from the court before such use. *Griffin Retreading*, 795 F.2d at 679-80; *accord Hartz Foods*, 264 B.R. at 36 (holding it is the "debtor-buyer's obligation, once it had received notice of the seller's intent to reclaim, to hold the goods for re-delivery to the seller or seek court approval to use the goods otherwise") (citing *Griffin Retreading*) (internal quotations omitted). This is consistent with the rationale for reclamation, which is to remedy the implied fraud that the buyer engaged in by accepting the goods while insolvent. Paramount Initial Response, at 8.

Even were the Court to agree with those cases generally requiring reclaiming creditors to file an adversary proceeding or to take some other additional steps to preserve the right of reclamation, in cases such as these where the Court has approved specific procedures requested by the Debtors that already go beyond the statutory requirements for establishing the right to reclaim, no more can later be required of a claimant who has

met both the statutory and case-specific procedures. *See Georgetown Steel*, 318 B.R. at 349 (finding that the debtor could not require reclamation claimants to do more than that which was required under the plain terms of the reclamation procedures order and that where through its procedures the debtor had set the timetable for determination of the reclamation issues, the debtor could not then use the late posture of the case and the fact that the goods are no longer in its possession against the reclaiming creditors);[16] *cf.* In re Semcrude, L.P., 416 B.R. 399, 404 (Bankr. D. Del. 2009) (finding that section 503(b)(9) claimants who had complied with the court's procedures had made a *prima facie* showing of the validity and amount of their claims and that because "one of the main purposes of the Procedures Order was to avoid a flood of motions in the Court," it would be inconsistent to require any sort of motion practice after the creditors complied with the

[16] The Debtors attempt to distinguish *Georgetown Steel* because, in that case, the reclamation procedures order specifically "enjoined" the creditor from seeking to reclaim its goods and the order provided that an allowed reclamation claim would be deemed an administrative expense. *See* Debtors Brief, at 27 n.17. They then argue that because the Reclamation Procedures Order contains neither an injunction nor an automatic administrative claim, the Debtors are not estopped from arguing that the reclamation creditors are not entitled to administrative expense status.

Paramount does not suggest that the Debtors are estopped from contesting Paramount's right to administrative expense status. Rather, Paramount contends that, under *Georgetown Steel*, the Debtors are estopped from arguing that additional steps were required to be taken in order to preserve its right of reclamation when the statutory and case-specific procedures have all been complied with. Although the Debtors repeatedly state that it was clear under the Reclamation Procedures Order that the reclamation claimants could initiate an adversary proceeding, *see, e.g.*, Debtors' Brief, at 27-28, it was not made clear that this was necessary. In *Georgetown Steel*, in finding the debtor was estopped from requiring additional steps be taken, the court relied on the fact that the debtor "did not suggest the Reclamation Creditors needed to further protect their interests beyond the plain terms of the Reclamation Order". 318 B.R. at 349. Here, the Debtors' procedures which were approved by the Court included a request "that the Court confirm that a reclamation claimant or any other third party is prohibited from seeking to reclaim Goods that have already been delivered, or from interfering with the delivery of Goods presently in transit to the Debtors" and Debtors' counsel stated that filing of a lawsuit or other actions could be taken if a reclamation claimant was uncomfortable with the procedures. Not only was it reasonable to infer from the Reclamation Procedures Order plus these statements that no action needed to be taken beyond compliance with the order, it would have been unreasonable to conclude otherwise.

procedures). As in *Georgetown Steel*, the Debtors should not be able to argue that Paramount's right is lost now that the goods are gone. It is because of the Debtors' very own procedures and timetable that Paramount was not given any notice of the Debtors' rejection of its Reclamation Demand until after all of its goods were sold.

On the first day of these cases, the Debtors requested that the Court set procedures for making a reclamation demand that would not interfere with the Debtors' operations. The Court approved the procedures immediately. Because these procedures established a mechanism for dealing with reclamation demands and claims in the case, Paramount rightly inferred that it needed to take no further steps in order to perfect or preserve its right of reclamation. Paramount complied with the reclamation procedures requested by the Debtors and set by the Court and responded to the Debtors' objections to their claims to ensure they protected their rights to the amounts owed, including the amount under the Reclamation Demand. In complying with these procedures, Paramount was not made aware that the Debtors' deemed their Reclamation Demand rejected until March 10, 2009, at which time the GOB sales were complete and all of the Debtors' inventory, including the goods subject to reclamation, had been sold. Although Paramount was prepared to litigate the issues surrounding reclamation much earlier in the case, the Debtors have continually postponed the hearing of the issues until now — over a year after Paramount's reclamation demand was served. Therefore, the Debtors should be estopped from arguing that Paramount was obligated to take any further steps to protect or preserve its right of reclamation.

VI.
"SUBJECT TO" DOES NOT IMPLY THAT RECLAMATION RIGHTS ARE AUTOMATICALLY EXTINGUISHED AND DOES NOT EVIDENCE A CLEAR CONGRESSIONAL INTENT TO ADOPT THE PRIOR LIEN DEFENSE.

The addition of the phrase "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof" in the BAPCPA amendments to section 546(c) is the focus of a large part of the Debtors' Brief. *See* Debtors' Brief, at 29-36. However, Paramount does not dispute that the rights of a reclamation claimant are "subject to" the rights of a prior senior secured lender.[17] What Paramount does take issue with is the leap the Debtors make from the insertion of that language to the assumption that Congress "expressly accepted the prior lien defense", which under the Debtors' interpretation renders Paramount's reclamation claim valueless. *Id.* at 31 (citing, *inter alia, Dana Corp.*).

As an initial matter, if any of the Paramount goods or proceeds therefrom remained in the Debtors' possession after the senior secured debt was satisfied or sufficient funds were obtained to satisfy the debt, Paramount would still hold a valid right to those goods or proceeds. Despite the Debtors' argument that the adoption of the prior lien defense by the statute automatically renders the Reclamation Claim valueless, it is consistent with the old majority of cases under the pre-BAPCPA section 546(c) (cited in the Debtors Brief, at 29-30, 32) to allow a reclaiming creditor to maintain an interest in goods or proceeds that were not actually used to satisfy the secured lender. *See, e.g., Pester Refining*, 964 F.2d at 846 ("[A]fter the secured creditors' superior interests have

[17] Paramount does not even dispute that the insertion of this language overrules the dicta in *Phar-Mor* suggesting that no reason exists why reclamation claimants should not have priority over the secured lenders. *See Phar-Mor*, 534 F.3d at 506.

been satisfied or released, the reclaiming seller retains a priority interest in any remaining goods, and in any surplus proceeds from the secured creditors' foreclosure sale.").[18] This is particularly significant under these circumstances, where the Debtors have brought a motion for summary judgment and the Court must view the facts in a light most favorable to Paramount. Therefore, for purposes of this analysis the Court must assume that when the DIP Facility[19] was paid in full, all of Paramount's goods still remained in the Debtors' possession. Under those facts, even courts applying the prior lien defense would not find that the reclamation creditor's right to his goods or the proceeds therefrom is extinguished.[20] If a court were to find that the statute's inclusion of the language "subject

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[18] The Debtors also claim that because reclamation is an *in rem* right, the right does not extend to the proceeds of the goods. *See* Debtors' Brief, at 35. However, the cases the Debtors cite for this proposition do not support it at all, but rather establish that (1) reclamation is an *in rem* right and (2) it is not an actual secured interest in the goods or proceeds (neither of which is disputed by Paramount). Further the cases cited here, including *Pester Refining*, specifically state that a reclamation claimant has an interest in the proceeds of its goods. *See also Georgetown Steel*, 318 B.R. at 348-49.

[19] It should be clear from the Debtors' repeated assertion of the "unbroken" nature of the lien chain between the prepetition secured facility and the DIP facility that there is a potential issue for them here as well. *See* Debtors' Brief, at 32-34. Pre-BAPCPA cases did not uniformly hold that a reclamation claimant was subject to both pre- and post-petition lenders with liens in the goods subject to reclamation. *See* In re Phar-Mor, Inc., 301 B.R. 482, 497 (Bankr. N.D. Ohio 2003), *aff'd* 534 F.3d 502 (6th Cir. 2008) (finding that when a prepetition secured creditor has been paid out of the DIP financing of the prepetition liens to the DIP lender, and such liens are released, the DIP financing does not affect the value of the reclamation claims). The inclusion in the statute of the phrase "subject to the ***prior*** rights of a holder of a security interest in such goods or the proceeds thereof" (emphasis added) does not show any congressional intent to subject reclamation claimants to secured lenders whose liens arise after the reclamation rights. Finally, the Debtors' statement that the goods subject to reclamation were "disposed of" when the prepetition lenders were paid off and the new liens were granted to the DIP Facility lenders is equally unavailing and is simply not true. Many, if not all, of the goods subject to reclamation were still in the Debtors' possession at the time the prepetition liens were paid.

For purposes of these arguments, Paramount shows that, even if its rights were subject to the rights of the DIP Facility lenders, the Debtors should still not be granted summary judgment, while disputing that the Reclamation Demand is subject to the DIP Facility.

[20] For example, in In re Advanced Marketing Svs., Inc., 360 B.R. 421 (Bankr. D. Del. 2007), also cited by the Debtors in support of their position, the Court found that reclamation claimants had failed to show the likelihood of establishing a valid reclamation right where the senior lender had not yet been paid in full and was being paid down through sale of goods. In these cases, we know that both the

to" could provide for such a result, then the amended statute does not just subordinate reclamation to the rights of a prior secured lienholder, but has done away with reclamation completely in any case where such a lienholder exists. This is both inconsistent with the case law[21] and is not a logical reading of the statute. *See also Phar-Mor*, 534 F.3d at 507 (disapproving of the application of the prior lien defense in post-2005 cases, including *Dana Corp.*). Presumably, if Congress had wished to take away the right to reclamation completely whenever a prior secured lienholder exists, it could have done so with much clearer statutory language.

Further, as the Debtors contend that reclamation rights are subject to the rights of the DIP lender, Paramount and the other reclamation claimants were, under this theory, essentially on hold until the DIP Facility was paid in full. Until the DIP Facility was paid or at least until it was clear that the GOB sales would generate sufficient proceeds to pay the DIP Facility in full, the reclamation claimants could not be certain that they had a valid right to reclaim. Therefore, even under the Debtors' interpretation of the statute, the rights of the reclamation claimants, including Paramount, will depend at least in part on what goods and excess proceeds from those goods were still in the Debtors' possession at the time sufficient proceeds were set aside from the sales to pay the DIP Facility in full. Because the Debtors have been unable to supply this information, Paramount submits that further discovery is necessary and the Debtors cannot be granted

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prepetition lenders and the DIP lenders have been paid in full and that excess proceeds remain. *See* page 6, *supra.*

[21] Courts have routinely held that the right of reclamation is not automatically extinguished by the presence of a senior secured lienholder. *See, e.g., Pester Refining*, 964 F.2d at 846; Dairy Mart Convenience Stores, Inc., 302 B.R. 128 (Bankr. S.D.N.Y. 2003); *Hartz Foods*, 264 B.R. at 37; In re ARLCO, Inc., 239 B.R. 261, 267 (Bankr. S.D.N.Y. 1999).

summary judgment for that reason alone.

Alternatively, although the Debtors try to dismiss marshaling cavalierly, citing only *Advanced Marketing* for the proposition that marshaling could never be invoked by a reclaiming creditor, *see* Debtors' Brief, at 35, Paramount submits that marshaling may turn out to be very relevant in these cases[22] and has been embraced in some reported decisions in the context of reclamation. *See, e.g.*, In re Quality Stores, Inc., 289 B.R. 324, 335 n.19 (Bankr. W.D. Mich. 2003) (noting that a subordinate reclaiming seller might seek to compel a superior secured creditor to marshal and satisfy its secured claim from assets other than the goods delivered by the subordinate reclaiming seller); In re Suwannee Swifty Stores, Inc., 2000 Bankr. LEXIS 2005, *10 (Bankr. M.D. Ga. March 22, 2000) (recognizing that it is a "close call" as to whether an unsecured creditor could invoke marshaling against a secured creditor but preferring cases allowing the remedy to be used in the context of reclamation). Similarly, in *Georgetown Steel*, the court held that where all of the Debtors' assets were sold, the reclamation creditors should not be prejudiced by the inability to trace because, rather than interfere by attempting to trace and segregate their proceeds throughout the sale process, they cooperated with the Debtors' sale, which included their goods. *Georgetown Steel*, 318 B.R. at 348.

If the facts ultimately reveal that the Debtors were no longer in possession of the

[22] A determination of whether or not marshaling or reverse marshaling should be applicable in the context of reclamation is not appropriate at this time. As stated throughout, for purposes of the Debtors' Motion, the Court must assume that all of the goods subject to Paramount's Reclamation Demand were still in the Debtors' possession at the time the prior secured lien was satisfied and were only sold after that time. Under these facts, no marshaling is necessary to preserve Paramount's continued interest in the proceeds of its goods. However, because the Debtors have attempted to dispense with even the possibility of marshaling, Paramount now responds to this argument as further discovery may make the debate relevant.

goods subject to Paramount's Reclamation Demand at the time sufficient funds were raised to satisfy the prior secured lienholder or, as the Debtors' initial discovery responses suggest may be the case, it is not possible (or would be very costly) to determine which claimants' goods were in the Debtors' possession at that crucial time, then, as in *Georgetown Steel*, Paramount should not be prejudiced by the Debtors' inability to trace its proceeds. An easy and rational response to the Debtors' likely assertion that they cannot trace which proceeds are from the goods subject to any individual reclamation claimant's demand is to assume that because the Debtors and the senior lenders should have respected the Reclamation Demands, or objected to them in a timely fashion (thus giving reclaiming vendors the ability to act), they found a way to satisfy the senior secured debt from sources other than the goods subject to reclamation. *Georgetown Steel*, 318 B.R. at 348. Additionally, requiring tracing now has some of the "gotcha" qualities of the earlier argument that compliance with the Reclamation Procedures Order was inadequate. *Georgetown Steel* addressed this contention, holding:

> The Reclamation Creditors should not be prejudiced by any argument that their rights are somehow diminished because they cooperated with a sale of Debtor's assets which included their goods…
>
> Additionally, it appears that the actions of Debtor discouraged, if not foreclosed, the Reclamation Creditors from seeking a tracing, or segregation, of their goods prior to the sale of Debtor's assets. Debtor requested that the Court delay and even enjoin any determination of the Reclamation Claims until this point in time – a point in time in which the goods have now been sold and the secured creditors paid in full, with substantial proceeds remaining. Debtor proposed and received the primary relief requested in the Reclamation Order – that is to retain possession of the reclaimed goods to assist in its reorganization. Through a procedure and timetable it requested, Debtor has led the Court and the parties to the present posture of the case.

318 B.R. at 349.

That very sensible response is equally appropriate here.

Even if the Court does not marshal in favor of the reclaiming vendors, it should not adopt what amounts to reverse marshaling. That is, there is no basis, factual or legal, to assume that the key parties, the Debtors and their secured lenders, not only ignored the rights of Paramount and others, but deliberately satisfied their claims from goods subject to reclamation demands. *See* In re Center Wholesale, Inc., 788 F.2d 541, 542 n.1 (9th Cir. 1986) (rejecting "a valuation formula that would reduce the value of the junior security interest by the value of the senior security interest without considering whether the senior secured party actually obtained satisfaction from some or all of the assets to which the junior interest attached.").

The Court should not accept an interpretation and application of the prior lien defense (such as that suggested in the Debtors' Brief) that penalizes parties that comply with court orders and that assumes (or presumes), without any evidence, that Paramount's Reclamation Demand is valueless because the senior lien was paid out of the proceeds of Paramount's goods.

VII.
CONCLUSION

There are three propositions that underlie the Motion legally. The first is that notwithstanding Paramount's compliance with the Reclamation Procedures Order – indeed, because of such compliance – Paramount lost its right to reclaim once the Debtors sold its goods. The second is that whenever there is a floating lien on inventory that exceeds the value of any individual vendor's goods, there is no reclamation right. To prevail, the Debtors must convince this Court that one of the first two legal propositions

is correct plus sustain a third one: that the payment in full of the entire prepetition secured debt before the sale of a single good is irrelevant notwithstanding that Bankruptcy Code § 546(c) makes a reclaiming creditor's rights subject only to "the ***prior*** rights of a holder of a security interest in such goods."[23]

If this Court does not accept such an extreme view of applicable law, then it will matter greatly what goods were sold and when and how promptly the secured debt was paid, so that this Court can determine to what extent Paramount (and others) have claims to the excess cash generated by the GOB sales.

For all these reasons, Paramount respectfully requests the Motion be denied.

Respectfully submitted,

DATED: January 8, 2010

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[23] If the Court rejects this third proposition, it may well be that summary judgment is appropriate – in favor of Paramount. A similar result would likely occur if this Court adopts the *Georgetown Steel* presumption, akin to marshaling, that the secured debt was satisfied from goods not subject to reclamation.

CERTIFICATE OF SERVICE

I, Korin A. Elliott, hereby certify that a true and correct copy of the foregoing *Opposition of Paramount Home Entertainment Inc. to Debtors' Motion for Summary Judgment With Respect to Certain Claims Subject to the Debtors' Nineteenth and Thirty-Third Omnibus Objections to Claims* has been served upon the parties listed below on this 8th day of January, 2010.

/s/ Korin A. Elliott
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